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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 524

JOHN E. LYDON AND MARTHA LYDON, HIS WIFE,
Petitioners,

vs.

R. W. CARNEY AND DOROTHY CARNEY, HIS WIFE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN E. LYDON,
Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 524

JOHN E. LYDON AND MARTHA LYDON, HIS WIFE,
Petitioners,

vs.

R. W. CARNEY AND DOROTHY CARNEY, HIS WIFE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioners John E. Lydon and Martha Lydon, his wife, petition this Honorable Court for a Writ of Certiorari to review that certain judgment of the Supreme Court of the State of Washington, entered on November 30, 1950, in the above entitled cause, and submit the following grounds and reasons therefor:

Decision for Review

The full and final decision of the Supreme Court of the State of Washington consists of two opinions of the Court

accompanying its remittitur entered on November 30, 1950 as follows:

1. Opinion rendered on August 1, 1950, unreported, pertinent portions whereof are quoted below:

"We gather from the remarks of the trial judge when ruling upon the motion for a judgment notwithstanding the verdict that he considered a licensed sanipractor when operating within his school of treatment should be governed by the same rules applicable to a physician, and, following the pronouncements made in Fritz vs. Horsfall, 24 Wn. (2d) 14, 163 P. (2d) 148, was of the opinion that malpractice was not established. The analogy does not apply to a drugless healer because he is restricted by statute to that which is permitted under the license issued to him. Rem. Rev. Stat., Secs. 10114 and 10123 (P. P. C. Secs. 517-5, -25); Martin v. Department of Social Security, 12 Wn. (2d) 329, 121 P. (2d) 394; State v. Houck, 32 Wn. (2d) 681, 203 P. (2d) 693.

"This is not a case where it can be said respondent was negligent in the performance of that which he undertook to accomplish. He knew appellant had diabetes. It was not what he prescribed or instructed appellant to do that created a foundation for legal liability. His fault lay in the fact that his method of treatment did not supply the pancreas deficiency necessary to retard the progress of the ailment with which appellant was suffering. There was evidence before the jury sufficient to support a finding that respondent knew or should have known, or discovered, his method of treatment for diabetes was not of a character productive of reasonable success. When such a situation arises, it then becomes the duty of a drugless healer to cease and desist from treating the patient and to advise him to seek other relief. Kelly v. Carroll, 136 Wash. Dec. 445, 219 P. (2d) 79."

2. Thereafter, the State Supreme Court, upon deeming its foregoing opinion incomplete, by virtue of its rules, for entry of final judgment in the case, recalled its remittitur from the trial court and on November 30, 1950, rendered a second and complementary decision as follows:

"On Recall of Remittitur

"A departmental opinion in this case was filed August 1, 1950, and was published in 136 Wash. Dec. at page 815. We reversed the judgment notwithstanding the verdict and remanded the case to enter a judgment thereon.

"We have recalled the remittitur so that we may review and determine the validity of the ruling of the trial court denying the motion of respondent for a new trial, as prescribed by Rule of Practice 14, 18 Wn. (2d) 42-a.

"Our attention is called to some remarks made by the trial judge when he considered the motion for a new trial, from which it is argued that he must have been of the opinion that the jury was influenced by passion and prejudice and believed that the respondent should not have treated appellant for the disease with which she was suffering. Upon this basis, respondent urges that we should accept the attitude of the trial judge and grant the motion for a new trial, notwithstanding the fact that even though he may have entertained such views, he denied the motion.

"It is not our province to speculate on what the jurors may have had in mind, nor to consider views expressed by the trial judge when the motion for a new trial was before the court. Our study of the record convinces us that no error was committed during the progress of the trial warranting a setting aside of the verdict of the jury. The evidence was sufficient from both a legal and factual standpoint to sustain the verdict, and nothing has been presented by respondent on this appeal requiring a reversal of the order.

"The order of the trial court denying the motion for a new trial is affirmed, and the cause again remanded for the entry of judgment upon the verdict of the jury."

Basis of Jurisdiction

1. The State Supreme Court's judgment is in conflict with its previously rendered decisions in regards to the law and principles governing the relations of physician and patient; such conflict of the decision herein is studied, considered and intentionally discriminatory; and same was expressly pointed out to the lower court by your petitioners in their first petition for rehearing, filed following the State Court's first opinion, as follows:

"We respectfully submit that a malpractice case, whether affecting a sanipractor, a chiropractor, a dentist, an optician, a surgeon or an oculist, can only be predicated upon the same premises. The respondent either committed malpractice by giving the wrong treatment or failing, at any rate, to give the proper treatment, from which there resulted injuries compensable in damages; or else he is not guilty of malpractice. To apply any other standard in this case would mean to put all non-medical schools of healing completely out of business, since they would be virtually charged with the duty to cure, or produce success at any rate, and that failing they would be liable for malpractice.

"In Brooks v. Hurd, 144 Wash. 276, 247 Pac. 238, this court said, apropos of a malpractice case brought against a sanipractic physician:

> 'In general, the court submitted the case to the jury upon perfectly proper instructions as to the law governing the relations of physicians and patients. Under the statutes above cited, drugless healers are strictly limited, each to his own school of practice, and forbidden to invade the field of practice of any other school of drugless healing or of any regular school of

healing. Otherwise the principles of law governing relation of regular physicians and surgeons and their patients govern as to drugless healers.' ''

(Respondents' petition for rehearing—(R. 21).)

To said petition the State Supreme Court duly made and entered its order as follows:

"The Court having considered the respondents' petition for a rehearing in the above entitled cause together with the appellants' answer thereto,

"It is ordered that the petition for a rehearing be and it is hereby denied."

2. The State Supreme Court's said judgment is discriminatory and denies respondents the equal protection of the laws, guaranteed by the XIV Amendment of the U. S. Constitution; and such discrimination was expressly submitted to the State Supreme Court by your petitioners' second petition filed following the Court's last opinion and entry of judgment in the case, entitled "Petition to Recall Remittitur Pending Steps for Appeal to U. S. Supreme Court" and argument thereon as follows:

"4. That respondents seriously intend to seek a Writ of Error or a Writ of Certiorari before the U. S. Supreme Court with the object of having reviewed the Supreme Court's decision on the following grounds, specifically:

A. That said decision is discriminatory in that it lays down a different rule of law for sanipractic physicians in a malpractice case than is applicable to medical physicians and such question was raised before Your Honors by respondent's petition for rehearing.

B. In that it places a stricter duty upon sanipractic physicians towards their patients than is required of medical

physicians, and the violation of such duties is made the basis of an action as for malpractice."

(Petition to Recall Remittitur Pending Steps for Appeal to U. S. Supreme Court, R. 31.)

"In our petition to recall the decision we ask, moreover, for general relief and may we now submit that not only the remittitur should be recalled and, of course, the judgment entered by the trial court vacated; *but moreover the Court should consider our objection and contention that said decision is discriminatory and in violation of Article XIV of the Federal Constitution in that it announces and applies one set of principles of law on a sanipractic physician in a malpractice case, but a different law applicable to medical practitioners in such cases, as heretofore pointed out in our briefs and petitions to the Supreme Court.*"

(Reply to Appellant's Memorandum Resisting Recall of the Remittitur (R. 34).)

To said last mentioned petition the said Supreme Court duly made and entered its order in terms as follows:

"The Court having considered the respondents' petition for a recall of the remittitur herein; the Appellant's memorandum in answer thereto; and the respondents' reply to the appellants' memorandum,

"It is ordered that the petition for the recall of the remittitur be and it is hereby denied."

Questions Presented and Specification of Errors

1. Whether, and your petitioner so submits, the State Supreme Court is in error by reversing the trial court's judgment in this case upon applying rules of law in direct conflict with its previous holding in cases affecting (a) sanipractors or drugless healers and (b) physicians in gen-

eral in their relationship with and duties towards their patients; particularly when it notices expressly by its decision such previously laid down rules of law.

2. Whether the State Supreme Court is in error by withholding, modifying and denying outright to your petitioner rights, benefits and immunities sanctioned by the Courts, universally as the law in malpractice actions, while extending same and specially reserving such rights to physicians and surgeons in general, the statutes of the State of Washington on drugless healing notwithstanding.

3. Whether the State Supreme Court erred in laying down by its decision and judgment certain special duties in your petitioner's relations towards his patients, not existing in and non-applicable to physicians and surgeons in general and in predicating negligence and awarding judgment based upon such special duties; and

Whether under both 2 and 3 preceding paragraphs under this heading, as your petitioner hereby submits, the lower court has denied your petitioner the equal protection of the laws guaranteed by the XIV Amendment of the U. S. Constitution.

Reasons Relied On for Certiorari

1. CONFLICT. The statutes of the State of Washington, copy whereof is appended to this petition, authorize the treatment of human disease in any form by licensed sanipractors through their accepted methods, which by their nature exclude and even deny (a) use of drugs (b) use of surgery.

In *Fritz* v. *Horsfall,* 24 Wn. (2d) 14, 163 P. (2d) 148, certain rules of law governing actions based upon malpractice as regards physicians and surgeons are laid down by the State Supreme Court.

Prior to that, the same Supreme Court ruled in the case of *Brook* v. *Hurd,* 144 Wash. 276, 247 Pac. 238, that "the

principles of law governing the relation of regular physicians and surgeons and their patients govern as to drugless healers."

In departure from and direct conflict with its said decision the State Supreme Court, while reserving said rights and applicable law as regards medical physicians and surgeons, expressly denies the same to your petitioner in the instant case, and generally to all drugless practitioners. The court by its decision in this case creates new duties as regards such practitioners, not warranted by the pertinent statutes licensing them or the law on malpractice in general, and moreover makes the non-observance of such added duties, whether consciously or unconsciously, a basis for an action as for malpractice, as may be seen from the following excerpts of its first opinion in the case:

"There was evidence before the jury sufficient to support a finding that respondent knew or should have known, or discovered, his method of treatment for diabetes was not of a character productive of reasonable success. When such a situation arises, it then becomes the duty of a drugless healer to cease and desist from treating the patient and to advise him to seek other relief. *Kelly* v. *Carroll*, 136 Wash. Dec. 445, 219 P. (2d) 79."

Importance of Question

Practically every element traditionally constituting malpractice in the treatment of disease is expressly negatived by the State Court's first decision. The patient's disease in this case was properly diagnosed, the examination was thorough and painstaking and the treatment was proper and customary among practitioners of that school. The results alone after 6 weeks treatment, came into dispute before the jury, as the above quoted excerpt of the court's first opinion shows.

The patient, feeling dissatisfied, same as she was with the medical care prior to calling on Petitioner, gave up any further sanipractic treatment of her own free choice and returned to medical treatment. After a period of hospitalization and upon condition of dependence on insulin, her condition "improved to such an extent as to enable her to live a comparatively normal life." (Court's first opinion.) There being no grounds so far to support a judgment as upon malpractice the lower court, by its decision, resorts to a fiction, so to speak, by holding, as the law in the case of sanipractic physicians that it was your petitioner's duty "to cease and desist from treating the patient and to advise him to seek other relief," upon assuming further that he "knew or should have known or discovered his method of treatment for diabetes was not of a character productive of reasonable success." (Court's first opinion.) Such a rule of law as a basis for malpractice in the case of drugless practitioners is tantamount to nullifying the entire act of the legislature of the State of Washington on drugless healing. One can conceive of few patients, as a practical matter, who would be fully satisfied at the end of treatment of their disease, whatever the school of healing they may have resorted to.

Under this rule on which the State Court's judgment, in reversal of the trial court's, is made to rest, practically all that a suing person would have to do would be to file an action against a sanipractor, with practically no alternative left to defendant than to pay the claim. In its practical effect, therefore, this decision, sought to be reviewed herein, puts this school of healing before the dilemma of either guaranteeing results by their method of treatment and even guaranteeing that the patient himself will agree that a sanipractor's method of treatment of disease was "of a character productive of reasonable success," or quitting

entirely such practice, all statutes to the contrary and laws generally applicable to malpractice cases notwithstanding.

Discrimination and Unconstitutionality of Decision

Generally both classes or schools of healing are engaged in the treatment of human disease by their respective methods. Neither in a sense denies or excludes the other. Only greater emphasis is placed by the one on natural methods for recovery, trusting, so to speak, in the inherent capacity of the human constitution to rally from its diseased condition upon establishment of favorable conditions on one hand by hydrotherapy, mechanotherapy, massaging and diet, and elimination of the factors which caused the health's breakdown on the other; while the traditionally orthodox profession emphasizes the use of medicine and surgery in its treatment of disease. That the latter is by far the most numerous of the two in no way proves that the existence of the other, upon state statute, and its methods of treatment are unnecessary or wrong.

Numbers and majorities may have many other advantages but in their last analysis they are merely methods of convenience, certainly no criteria of truth. One dreads to indulge in historic illustrations: Democracy first appears in the form of a common and deformed soldier defying the decisions reached by the kings in meeting before the walls of Troy. Christianity first defies Jewish hierarchy and later paganism in the persons of a few "fanatics" and as a cult. Independence on this continent of ours starts with a small number of "traitors to the crown" in Faneuil Hall; Europe's "Droits D'Homme" have their origin in the outburst of an inmate of a French prison with a "mob"; and one can cover tomes with examples in our endeavor to prove that the medical and surgical profession may after all be wrong, at least in some respects and indeed may

need a whip or "gadfly", as another small cult led by the founder of deductive logic started out in revolt against crammed sophism 25 centuries ago.

Statement

Respondent instituted an action consisting of two causes, one predicated upon an agreement of guarantee alleged to have been made with petitioner, which was dismissed upon peremptory instruction of the trial court to the jury at the close of the case, and the other upon malpractice. Upon the jury bringing a verdict for plaintiffs, defendant moved for judgment *non obstante* and in alternative for new trial. The trial court granted defendant's motion *non obstante veredicto,* hence, it denied new trial, alternatively moved as aforesaid. Upon appeal of respondents herein to the State Supreme Court, the trial court was reversed and judgment ordered to be entered for plaintiffs below in accordance with the verdict. Under rules of the Supreme Court of the State of Washington the decision of the Supreme Court was incomplete unless it "shall, if it reverses the judgment entered notwithstanding the verdict, review, and determine the validity of the ruling on the motion for a new trial." (Rule 14, Rules of Pleading, Procedure and Practice, appended hereto.) Before such nonfinal decision the State Supreme Court, after denying a petition for rehearing, filed following such incomplete opinion by your petitioner, recalled its remittitur and completed its decision by rendering a second *per curiam* opinion and immediately thereafter transmitted its final mandate to the trial court.

Your petitioner thereupon filed what in effect amounted to a second petition for rehearing, although entitled "Petition to Recall Remittitur Pending Steps for Appeal to U. S. Supreme Court." Indeed this last proceeding may

be deemed as the only regularly filed petition for rehearing upon a final decision of the State Court, by reason of the premises. In it and the argument submitted in support thereof, your petitioner specifically raised the question of impingement of the State Court's final judgment on the XIV Amendment of the U. S. Constitution, as follows:

"A. That said decision is discriminatory in that it lays down a different rule of law for sanipractic physicians in a malpractice case than is applicable to medical physicians and such question was raised before Your Honors by respondent's petition for rehearing.

"B. In that it places a stricter duty upon sanipractic physicians towards their patients than is required of medical physicians, and the violation of such duties is made the basis of an action as for malpractice." (Petition to Recall, etc., (R. 31).)

And further:

"In our petition to recall the decision we ask, moreover, for general relief and may we now submit that not only the remittitur should be recalled and, of course, the judgment entered by the trial court vacated; *but moreover the Court should consider our objection and contention that said decision is discriminatory and in violation of Article XIV of the Federal Constitution in that it announces and applies one set of principles of law on a sanipractic physician in a malpractice case, but a different law applicable to medical practitioners in such cases, as heretofore pointed out in our briefs and petitions to the Supreme Court.*" (Reply to Appellant's Memorandum resisting Recall of the Remittitur (R. 34).)

The Supreme Court declined to set the case for reargument as prayed for in said petition or write an opinion on the challenged constitutionality of its final judgment.

However, the court took particular notice of such question as shown by the order entered thereon as follows:

"The Court having considered the respondents' petition for a recall of the remittitur herein; the Appellants memorandum in answer thereto; and the respondents' reply to the Appellants' memorandum,

"It is ordered that the petition for the recall of the remittitur be and it is hereby denied."

ARGUMENT

Federal Question Raised and Considered by Lower Court

Final judgment was entered in this case by the State Supreme Court's release and transmittal of its remittitur, on November 30, 1950, filed in the trial court on December 2, 1950. Its first opinion, issued in the case on August 1, 1950, was admittedly incomplete, as shown by its subsequent *per curiam* opinion completing the same. To put in better relief the non-finality of the court's first decision, all we have to do is to suppose that the court had overruled, instead of affirming, the trial court's judgment denying the alternative motion for a new trial when granting judgment *non obstante*. This would at once nullify the State Supreme Court's first opinion or decision of August 1, 1950. That the Supreme Court could do so is unquestionable, and as long as it could do so it had control of the case; hence there was no final judgment until after its second decision, and in a sense the court's first opinion was academic until the entry of final judgment on November 30, 1950.

In 2 Am. Jur., p. 864, Section 24, the following is said *apropos* of this question:

> "As a general rule, the face of the judgment is the test of its finality. However for the purpose of determining the final character of a decree of an appellate

court directing the court below to proceed in accordance with the views expressed in its opinion, the *opinion* may be considered as part of the decree."

The foregoing statement is taken *verbatim* from *Clark* v. *Williard*, 292 U. S. 112, 78 L. ed. 1160, 54 S. C. 615, in which the court issued a writ of *certiorari*, overruling the opposite contention that the face of the judgment unaccompanied by the opinion (in our case 'opinions') is the test of its finality.

The petition, filed promptly thereafter by your petitioner with its accompanying argument in brief and asking for a recall of the same by calling to the court's attention the unconstitutional features of its judgment, particularly as violating Amendment XIV thereof, must, in our opinion be deemed, in its entirety, a proceeding by your petitioner to reopen the case for re-argument and to reconsider it pending steps for review before the U. S. Supreme Court upon such grounds. We admit that this proceeding lacks in formal presentation of the question. Outstanding features of it however, when considered in its substance, are (a) that the federal question was specifically presented to the State Supreme Court at (b) a time when it still had jurisdiction, since the error of unconstitutionality appeared on the face of the judgment, (c) the Supreme Court expressly entertained the question and in its own words "considered" it, and (d) denied the same or refused to set the case for re-argument on the question. That the court in doing so wrote no constitutional opinion is of no moment. Indeed, as is well known, rarely any opinion is written upon denial of rehearing or re-argument of a case, whatever the grounds therefor.

In *Grannis* v. *Ordean*, 34 S. Ct. 779, 234 U. S. 385, 58 L. ed. 1363, 1368, Your Honors held under strikingly similar circumstances, where the applicant had "suggested"

that the necessary effect of the decision was to deprive him of his property without due process of law, contrary to the XIV Amendment, that this was sufficient and granted the writ.

"There is a motion to dismiss, upon the ground that the Federal question was not properly raised in the state court. This motion must be denied. It is true that until the decision of the supreme court of the state, the Federal right was not clearly asserted. But it was not infringed in the trial court, which held in favor of the contention of defendant (now plaintiff in error) that the decree in the partition suit was not valid because of the insufficiency of the notice to Geilfuss. It was the decision of the supreme court, upholding the notice, that first ran counter to the alleged Federal right. In a petition for re-argument, filed by the now plaintiff in error, it was suggested that the necessary effect of the decision was to deprive him of his property without due process of law, contrary to the XIV Amendment. The supreme court entertained the petition, considered and overruled the contention that petitioner's rights under the Amendment were infringed declared that its decision was to be interpreted as holding against the contention, and therefore refused a re-argument. This is sufficient to confer jurisdiction upon this court. (Citing cases)

"We therefore proceed to the merits."

This petition has already assumed the form, and, we fear, proportions of a combined application for *certiorari* and brief in support thereof.

We would deem appropriate to close it at this point reserving for special treatment, the questions: (1) in what respect does the judgment of the lower court impinge upon rights of your petitioner guaranteed by the XIV Amendment of the U. S. Constitution, (2) is the question a sub-

stantial one or vital in its ultimate effects and repercussions as such violation.

Conclusion

For the foregoing reasons we submit and pray this Honorable Court that a writ of certiorari be issued to the Supreme Court of the State of Washington reviewing the judgment herein and/or for such further and alternative relief as may be just and proper in the premises.

Respectfully submitted,

JOHN E. LYDON,
Petitioner.

UNITED STATES OF AMERICA,
State of Washington,
County of King, ss:

John E. Lydon, having first duly sworn on oath deposes and says: That he is the Petitioner in the foregoing petition for a writ of Certiorari, that he has read the same and believes it to be true.

JOHN E. LYDON.

Subscribed and sworn to before me this 4th day of January, 1951.

CHRIST D. LILLIONS,
[SEAL.] *Notary Public in and for the State of Washington, residing in Seattle.*

EXHIBIT A

REMINGTON'S REVISED STATUTES OF THE STATE OF WASHINGTON

Vol. 10, p. 748

Chapter 8

DRUGLESS HEALING

10112. EXAMINATIONS—SECRETARY'S RECORDS.

10113. LICENSE FEE—QUALIFICATIONS — EXAMINATIONS — REFUSALS AND CANCELLATIONS.

10114. FORMS OF CERTIFICATES TO PRACTICE—AFFIDAVITS AND TESTIMONIALS. The following forms of certificates shall be issued by said board under the seal thereof, and signed by the president and secretary:

First. A certificate authorizing the holder thereof to practice mechanotherapy;

Second. A certificate authorizing the holder thereof to practice suggestive therapeutics;

Third. A certificate authorizing the holder thereof to practice food science;

Fourth. A certificate authorizing the holder thereof to practice physcultopathy;

Fifth. A certificate for any other separate and co-ordinate system of drugless practice, and such system shall be given two representations on the board: Provided, they shall show evidence of not less than fifty graduates, practicing in this state, whose requirements shall be no less than as set forth in this act. Practitioners hereunder shall confine their practice to the subjects and system or systems represented by their certificate or certificates granted by said board. The applicant for examination must file at least 30 days prior to a regular meeting satisfactory testimonials of good moral character and a diploma

issued by some legally chartered drugless college, or satisfactory evidence of having possessed such diploma, except as herein otherwise provided, and must fill out a blank application to be sworn to before some person authorized to take acknowledgments, showing that he or she is the person named in the diploma, is the lawful holder thereof, and that the same was procured in the regular course of instruction and examination, without fraud or misrepresentation. The said application shall be made on a blank furnished by said board, and shall contain such other information concerning the instruction and preliminary education of the applicant as said board may by rule adopt. (L. '19, p. 67, paragraph 4.)

10115. Disposition of Moneys Collected—Drugless Practitioner's Fund.

10116. Recordation of Licenses.

10117. Health and Vital Statistics Regulations.

10118. Persons Excepted from Provisions of Act.

Nothing in this act shall be construed as to prohibit service in the case of emergency, or the domestic administration of families' remedies, nor shall this act apply to any commissioned health officer in the United States army, navy or marine hospital service, in discharge of his official duties, nor to any licensed dentist when engaged exclusively in the practice of dentistry, nor to any duly licensed physician in the practice of medicine, or surgery, nor to a person duly licensed to practice osteopathy, from using or recommending drugless methods of healing in the course of their practice, nor shall this apply to any practitioner from any other state who visits this state in response to a call to treat a particular patient; Provided, such practitioner shall not open an office or appoint a place of meeting patients within the limits of this state, nor shall this act be construed to discriminate against any particular school of drugless therapeutics or to interfere in any way with the practice of religion: Provided, also that nothing in this act shall be held to apply to, or regulate

any kind of treatment by prayer. (L. '19, p. 69, paragraph 8.)

10119. Unprofessional Conduct Defined.

10120. Illegally Practicing. Any person not heretofore authorized by law who shall practice or attempt to practice or hold himself out as practicing drugless therapeutics in the State of Washington without having obtained the license herein provided for, contrary to any provisions of this act, shall be guilty of a misdemeanor, and shall be punished as provided by law for such offenses. Any person shall be regarded as practicing within the meaning of this act who shall use, prescribe, direct or recommend, any drugless treatment for the relief of any wound, fracture, bodily injury or disease, either mental or physical: Provided, this act shall not be construed to discriminate against any particular school of drugless therapeutics, or to interfere in any way with the practice of religion: Provided, also, that nothing in this act shall be held to apply to or regulate any kind of treatment by prayer. (L. '19, p. 71, paragraph 10.)

10121. Examination Regulations—Fee—Credits—Conduct of Examinations.

10122. Definitions. The term "separate and co-ordinate system" as used in this act is defined as follows:

Food Science: Is the science of treating disease through the chemical action of foods, water, nonmedicinal herbs, roots and barks, and all natural food elements other than pharmaceutic drugs and poisons, to bring about a normal condition of health.

Mechano-Therapy: Is a system of therapeutics which enables the practitioner to know how to apply scientifically the mechanics of hydrotherapy, dietetics, circumstances, idea and manual manipulation for the stimulation of phycho and physiological action to establish a normal condition of the body.

Suggestive Therapeutics: Is a system of healing which enables the practitioner to know how to offer suggestions

that will cause the mind of the patient to overcome the disease of the body and bringing mind and body into harmony, and both into harmony with environment.

Physcultopathy: Is a system of healing which enables the practitioner to know the scientific effect of movements on the body and how to direct a system of mechanical gymnastics that restore the diseased parts or functions to a normal condition. (L. '19, p. 73, paragraph 12.)

Cited in 113 Wash. 372, 194, Pac. 388. This section was not intended to draw a distinction between mental healing resulting from suggestions from the practitioner and reasoning between the practitioner and patient; and a practitioner depending upon the latter system is not entitled to demand a certificate as an exponent of another "separate and co-ordinate system" under the name which has been designated by the school adopting that system: Wells v. State Board of Drugless Examiners, 113 Wash. 371, 194 Pac. 388.

10123. Drugless Therapeutics Defined. The term "drugless therapeutics" as used in this act consists of hydrotherapy, dietetics, electrotherapy, radiography, sanitation, suggestion, mechanical and manual manipulation for the stimulation of physiological and psychological action to establish a normal condition of mind and body, but shall in no way include the giving, prescribing or recommending of pharmaceutic drugs and poisons for internal use, the purpose of this act being to confine practitioners hereunder to drugless therapeutics.

The words "certificate" and "license" shall be known as interchangeable terms. (L. '19, p. 74, paragraph 13.)

Cited in 144 Wash. 174, 257 Pac. 238.

10124. Advertising Matter.

10125. Penalty for Violations of Act.

10125-1. Proceedings to Revoke License—Order to Appear—Service.

10125-2. Re[illegible]tion for Refusal to Comply With Order—Reinsta[illegible]ent

10125-3. Hearing.

10125-4. License Revoked or Returned.

10125-5. Appeal to Superior Court.

10125-6. Surrender of License—Penalty.

10125-7. Supplemental Legislation. Nothing in this act shall be construed as amending, modifying or repealing any other provision of law for the revocation of licenses but this act shall be construed as additional and supplemental legislation. (L. '25, p. 25, paragraph 7.)

Office-Supreme C
FILE
MAR 7
CHARLES ELMORE

No. 524

Supreme Court of the United States

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Petitioners,

— vs. —

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENTS IN OPPOSITION

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THE ARGUS PRESS, SEATTLE

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THE ARGUS PRESS, SEATTLE

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CONSTITUTION

United States Constitution, XIV Amendment 4, 8

Supreme Court of the United States

OCTOBER TERM, 1950

JOHN E. LYDON and MARTHA LYDON, his wife, *Petitioners*, vs. R. W. CARNEY and DOROTHY CARNEY, his wife, *Respondents*.		No. 524

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The first opinion of the Supreme Court of the State of Washington (R. 11-13) is as yet unreported in the Washington Reports, but is reported at 220 P.(2d) 894. The second opinion of the state court (R. 29) is also unreported as yet in the Washington Reports but is reported at 224 P.(2d) 634.

JURISDICTION

Although not disclosed by the Petition, the Petitioners apparently seek to invoke 28 U.S.C., Section 1257(3) to support the jurisdiction of this Court, seeking relief from a judgment of the Supreme Court of the State of Washington, the highest court of that state, entered on November 30, 1950 (R. 30).

The Federal questions, if any, were raised for the first time in this litigation in the highest state court

by Petitioners' Reply to Appellants' Memorandum Resisting Recall of the Remittitur (R. 34), which memorandum was filed in the highest state court on December 8, 1950, said date being eight days after the date of the judgment and mandate (R. 30) of said court, and six days after the court of first instance had entered its judgment thereon (Petition, p. 13).

The highest state court entered an order (R.35) denying Petition to Recall Remittitur without opinion.

QUESTIONS PRESENTED

Whether a Federal question upon which this Court can pass was raised:

1. When the claim to the highest state court that a Federal constitutional right had been invaded was made after that court had lost jurisdiction of the cause under its rules and decisions.

2. When no Federal question was passed upon in any state court.

STATUTES INVOLVED

The only statutes involved are the provisions of the Drugless Healing Act of the State of Washington, set forth in the Petition at pp. 17-21.

STATEMENT

This litigation concerns a malpractice action against a drugless healer (R. 1-9). The jury returned a verdict in favor of Respondents, and the trial court

granted Petitioners' motion for judgment notwithstanding the verdict and denied their motion for a new trial (R. 10-11).

The Supreme Court of the State of Washington reversed the judgment of the lower court and directed the entry of judgment on the verdict (R. 11-13).

Petitioners filed a Petition for Rehearing (R.13-26), Respondents filed an Answer to Petition for Rehearing (R. 38-43), and the highest state court denied the Petition without opinion (R. 27).

The State Supreme Court then recalled the Remittitur (R. 28) to pass upon the finding of the trial court on the motion for a new trial, as it was required to do by its rules (R. 36-37).

Petitioners submitted two memoranda (not in record) urging that the trial court's ruling on this question was incorrect. Respondents filed a memorandum (R. 43-47) on this question. The State Supreme Court affirmed the ruling of the trial court in denying Petitioners' motion for a new trial (R. 29) and entered its judgment (R. 30) on November 30, 1950.

On December 6, 1950, Petitioners filed a petition in the State Supreme Court entitled "Petition to Recall Remittitur Pending Steps for Appeal to U.S. Supreme Court" (R. 31-32), Respondents filed a memorandum in answer thereto (R. 47), and Petitioners filed a reply memorandum (R. 33-35), for the first time (R. 34-35) asking the State Supreme Court to pass upon a Federal question.

The State Supreme Court denied the Petition to Recall Remittitur without opinion (R. 35).

ARGUMENT

Respondents respectfully submit that the Petition should be denied because:

I. The Petition is not in conformity with the Rules of the Court.

II. The Federal claim was raised too late in the highest state court, which had lost jurisdiction of the cause.

III. No Federal question was passed upon by the state court.

I. Petition Not in Conformity with Rules

Respondents respectfully submit that the Petition herein is not in conformity with Rule 12(1) par. 1 and 3, and Rule 38(2), Revised Rules of the Supreme Court of the United States, and should therefore be denied.

In addition, Petitioners close their Petition (pp. 14-15) "reserving for special treatment the questions: (1) in what respect does the judgment of the lower court impinge upon rights of your petitioners guaranteed by the XIV Amendment of the U. S. Constitution, (2) is the question a substantial one or vital in its ultimate effects and repercussions as such violation?" When are we to get the "special treatment"? When will Petitioners decide to raise their Federal question in this Court?

Inasmuch as under the rules and practice of this Court these are crucial issues, concerning which Petitioners have the laboring oar, Respondents do not feel bound to propound the negative. Respondents do feel that the omissions by Petitioners are fatal to their Petition.

II. Claim Too Late

A. When was claim raised?

Was Petitioners' Federal claim raised with particularity prior to their Reply to Appellants' Memorandum Resisting Recall of the Remittitur (R. 33-35)? We think not.

Petitioners first allege (Petition, p. 5) that such a claim was made in their Petition to Recall Remittitur (R. 31-32), which was filed six days after the State Supreme Court's judgment, and more than three months after they filed their Petition for Rehearing (R. 13-26).

That such allegations would not be adequate is made plain in *Oxley Stove Co. v. Butler County*, 166 U.S. 648, 655; *Herndon v. Georgia*, 295 U.S. 441, 442-3; *Harding v. Illinois*, 196 U.S. 78, 88; *Capital City Dairy Co. v. Ohio*, 183 U.S. 238, 248; *Bowe v. Scott*, 233 U.S. 658, 664-5.

Moreover, the relief for which Petitioners prayed in this instance (R. 32) was for a recall of the judgment from the trial court, so that the same might be held in the State Supreme Court.

In their reply memorandum (R. 33-35) Petitioners do raise a Federal question, and they enlarged the scope of their prayer (R. 34-35) in an attempt to get another hearing on this matter.

B. What is proper state procedure?

The proper method of raising the Federal questions is dependent upon the particular state practice, at least as long as the litigant thereby has a reasonable

opportunity to have such an issue heard and determined. *Parker v. Illinois*, 333 U.S. 571, 574-5; *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447, 462-3; *Central Union Co. v. Edwardsville*, 269 U.S. 190, 194-5.

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise, and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law." *John v. Paullin*, 231 U.S. 583, 585.

See also *C.I.O. v. McAdory*, 325 U.S. 472, 477; *Chesapeake & Ohio R. Co. v. McDonald*, 214 U.S. 191; *Harding v. Illinois*, 196 U.S. 78.

In the State of Washington, the Supreme Court has stated that upon Petition for Rehearing the Court will not consider points there raised for the first time, unless they can be reasonably predicated on assignments of error theretofore made. *State ex rel. Milwaukee Term. R. Co. v. Superior Court*, 54 Wash. 365, 377, 104 Pac. 175.

The State Court will not consider a constitutional question first raised in a Petition for Rehearing. *State v. Hazzard*, 76 Wash. 586, 137 Pac. 143.

C. No surprise and ample non-federal grounds

Petitioners cannot claim surprise in the opinion (R. 11-13) of the State Court. In their Petition (pp. 7-8) they rely on *Brooks v. Hurd*, 144 Wash. 276, 247 Pac. 238, by partially quoting the Court's

holding. The sentence immediately preceding the sentence upon which they rely is:

> "Under the statutes above cited, drugless healers are strictly limited, each to his own school of practice, and forbidden to invade the field of practice of any other school of drugless healing or of any regular school of healing."

The other cases cited by the State Court, *Martin v. Dept. of Social Security*, 12 Wn.(2d) 329, 121 P.(2d) 394; *State v. Houck*, 32 Wn.(2d) 681, 203 P.(2d) 693; and *Kelly v. Carroll*, 136 Wash. Dec. 445, 219 P.(2d) 79, *certiorari* denied November 27, 1950, 19 Law Week 3149, are all applicable and controlling in the case at bar. Petitioners knew, or should have known, of all of them. Petitioners have at no place shown of any cases overruled or any reason for surprise.

D. State court without jurisdiction

At the time a Federal question was raised, the State Court had lost jurisdiction. In *Kosten v. Fleming*, 17 Wn.(2d) 500, 504-513, 136 P.(2d) 449, the Court discussed various holdings, texts, and rules at length, and held that after the transmittal of the Remittitur or Mandate to the lower court, the State Supreme Court lost jurisdiction and could not recall the Remittitur except where it considers that the judgment transmitted, because of inadvertent error, mistake, fraud or lack of jurisdiction, was not in fact the judgment of the Supreme Court, or where the lower court entered a judgment not conforming to the Mandate of the highest court.

Petitioners could not qualify under this rule then, and they cannot now.

III. No Federal Question Passed Upon by State Court

In spite of the failings of Petitioners' procedure, did the highest state court in fact pass upon any Federal question?

Their language in the Order Denying Petition to Recall Remittitur (R. 35) is: "* * * having considered the * * * petition; * * * the * * * answer * * *; and the * * * reply * * *, It is Ordered that the petition for the recall of the remittitur be and it is hereby denied."

Petitioners' lone citation (Petition pp. 14-15) is not apt here. In that case, *Grannis v. Ordean*, 234 U.S. 385, a due process question under the Fourteenth Amendment was raised in a Petition for Re-Argument, and the state court specifically overruled the contention that rights under the amendment had been infringed and declared that its decision was to be interpreted as holding against the contention.

Even had the Federal question in the case at bar been advanced in the Petition for Rehearing (R. 13-26), which it was not, or as it was advanced eight days after final judgment, it was never passed upon. The orders denying the petitions contain but a cursory recital and show no consideration and disposition of a Federal question. See *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.*, 228 U.S. 326, 333-4; *Forbes v. State Council*, 216 U.S. 396, 399; *McCorquodale v. Texas*, 211 U.S. 432, 436-7.

CONCLUSION

For all the reasons stated, Respondents submit that this Petition should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 524

JOHN E. LYDON and MARTHA LYDON, his wife,
Petitioners,

vs.

R. W. CARNEY and DOROTHY CARNEY, his wife,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY BRIEF

JOHN E. LYDON, *Petitioner*
In propria persona.

1520 Smith Tower,
Seattle 4, Washington.

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Supreme Court of the United States

OCTOBER TERM, 1950

JOHN E. LYDON and MARTHA LYDON, his wife, *Petitioners,*

vs.

R. W. CARNEY and DOROTHY CARNEY, his wife, *Respondents.*

No. 524

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY BRIEF

Respondents' argument for a denial of the Petition is predicated upon three numerically arranged grounds, as follows:

I. The Petition is not in conformity with the rules of the court.

II. The Federal claim was raised too late in the highest state court, which had lost jurisdiction of the cause.

III. No Federal question was passed upon by the state court.

Ground I.

Under this heading respondents refer to petitioners' statement on page 15 of the Petition to the effect that the questions involved would be treated further in a supporting brief, and with manifest sarcasm ask:

> "When are we to get the 'special treatment'? When will petitioners decide to raise their Federal question in *this* court?"

In faithful consistence with such attitude, respondents then apply their own personal interpretation of rule 38, Revised Rules of the Supreme Court of the United States, concerning "opposing briefs" and practically "sit tight" as to all grounds and contentions set forth in the Petition except the "lone" one whether or not the Federal question was raised in the court below.

We submit that respondents' "opposing brief" must cover the entire case as set forth in the Petition for a Writ of Certiorari, and not just the authority-backed questions and phases of the case. Respondents, therefore, having deliberately failed to do so, must be deemed to admit all other unopposed grounds and contentions set forth in the Petition for a Writ of Certiorari.

Respondents' Ground II-A

In our Petition we argue and submit to Your Honors that the State Supreme Court did not render a final decision until its complementary *per curiam* opinion was filed on November 30, 1950, following which the Remittitur of the State Supreme Court was issued and transmitted to the Clerk of the Superior Court. The rule which caused the State Supreme Court to recall its first opinion and complete its decision on November 30, 1950, provides, *inter alia,* as follows:

> "and the Supreme Court *shall,* if it reverses the judgment entered, notwithstanding the verdict, review and determine the validity of the ruling on the motion for a new trial." (Tr. 37)

That the Supreme Court intended thereby to place upon itself a mandatory requirement for finality of its decision in such cases may be seen from the following definition given in the recently published revision of Rules on Appeal of the Supreme Court of the State of Washington:

> "(d) The word 'shall' and 'must' are mandatory, and the word 'may' is permissive." (Suppl. Tr. 2)

In *Oxley Stove Co. v. Butler County,* 166 U.S. 648, cited by respondents, the court had for review a final judgment of the Supreme Court of Missouri, *affirming* a trial court's judgment. After going exhaustively into the facts of the case, the court rules as follows:

> "Looking into the record, we do not find that *any reference* was made in the court of original jurisdiction to the Constitution of the United States. Nor can it be inferred from the opinion of the Supreme Court of Missouri that the court was informed by the contention of the parties that any Federal right, privilege or immunity was intended to be asserted. For aught that appears, the state court proceeded in its determination of the cause *without any thought* that it was expected to decide a Federal question." (page 655).

Before distinguishing the rest of respondents' cases, we may be allowed to repeat here *a propos* of the judgment sought to be reviewed in the instant case, that petitioners had *prevailed* in the trial court and from a judgment in their favor respondents herein appealed to the State Supreme Court. Up to this point, therefore, there could be no occasion for petitioners to raise any question against the judgment, whether Federal or any

other. Thereafter, the State Supreme Court reversed the said judgment and entered judgment for respondents herein on November 30, 1950. Any Federal question, therefore, as far as petitioners are concerned, commenced to appear since the State Supreme Court entered judgment for respondents herein in reversal of the trial court's judgment. Until that time the state court's opinion could be rewritten as many times as the five Judges of the deciding Department of the Supreme Court, or all nine members thereof, might choose. Hence, it is our contention that the Federal question under the 14th Amendment did not exist until it was created by the State Supreme Court's final decision on November 30, 1950, and the filing of its Remittitur. To anticipate it in that state of the record would have meant to anticipate a defeat in the state Supreme Court by a reversal of petitioners' judgment upon the appeal by Respondents herein.

The court says further in the Oxley case:

> "Nor *can it be inferred* from the opinion of the Supreme Court of Missouri that the court was *informed* by the contention of the parties that any Federal right, privilege or immunity was intended to be asserted."

In the instant case, the Supreme Court of the State of Washington was not only "informed" that its decision violated rights of petitioners guaranteed by the 14th Amendment, but, what is more important, it specifically states so in its order, dated December 22, 1950, namely, that it has considered the Federal question, as a ground and reason for a recall of the Remittitur and re-argu-

ment of the case, and with that in mind it denied the Petition. The State Supreme Court takes particular pains, by its order of December 22, 1950, to enumerate, with apt punctuation and specific reference to title, all three proceedings pending before it, namely, "Respondents' Petition for the Recall of the Remittitur herein; the appellants' Memorandum in answer thereto; and the respondents' *Reply* to the appellants' Memorandum" (Tr. 35).

Herndon v. State of Georgia, 295 U.S. 441, was an appeal from a judgment of conviction, which the State Supreme Court merely affirmed. In the trial court the indictment was attacked as being in violation of the U. S. Constitution, but the court's ruling "was not preserved by exceptions *pendate lite* or assigned as error in due time in the Bill of Exceptions, as the settled rules of the state practice require"; hence the State Supreme Court declined to review any of the rulings of the trial court in respect of that and other preliminary issues.

> "The Federal question was never presented to the state court unless upon motion for rehearing; and that court then *refused to consider* it. The long-established general rule is that the attempt to raise a Federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually *entertains the question* and *decides* it. (Italics petitioner's.)

It was claimed further in that case that petitioner came within the rule of "unanticipated' decision of the State Supreme Court, in which case the U. S.

Supreme Court concedes that the question was properly presented by a petition for rehearing:

"The whole point, therefore, is whether the ruling here assailed should have been anticipated." The court ruled in the negative on this point, with Justices Cardozo, Stone and Brandeis dissenting.

In the Annotation to that case, 79 L. ed. 1540, the following is stated on this question:

"However, where the Federal question, although first presented in a petition for rehearing to the highest state court *after a final* judgment therein, is *considered* or decided by that court in *passing on the petition,* the question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court"; giving as authorities for the rule: *Great Northern R. Co. v. Sunburst Co.* 287 U.S. 358; *Fleming v. Fleming,* 264 U.S. 29; and *Cumberland Coal Co. v. Board of Revision,* 284 U.S. 23.

In the *Fleming* case, *supra,* the Federal question was first raised in an application for a *second* rehearing in the State Supreme Court; and in the Cumberland case the question of constitutionality was first presented in a petition for reargument to the highest state court.

Harding v. Illinois, 196 U.S. 78. cited by respondents, was an action to recover delinquent taxes on real estate. It was claimed at the trial that the property in question had been conveyed by defendant Harding to a loan company for a consideration of $5.00, but both trial court and the State Supreme Court, later, held that the property was defendant's own notwithstanding the

pretended conveyance. The Illinois statute, under which the action was filed, provided in effect that in any such suit for forfeited taxes the fact that the real estate is assessed to a person shall be *prima facie* evidence of ownership by that person. In the assignment of errors before the Supreme Court of Illinois, the closest that appellant came to raising the Federal question was as follows:

> "The findings and judgment of the court were erroneous for the several reasons stated in the points filed in support of the motion to set aside the findings and grant a new trial." (196 U.S. 85).

It is obvious from the foregoing that respondents herein overlook the fact that until the decision of the State Supreme Court was handed down in the instant case, petitioners, as the prevailing party, had no grievance whatever against the judgment appealed from by respondents. Petitioners actually became the aggrieved party in the case only upon the entry of the State Supreme Court's judgment on November 30, 1950, and not until then. When this is taken into consideration, respondents' authorities are not only inapplicable to the situation on hand, but it would seem that they were grasped at by respondents at random without a critical study and analysis of the principle involved.

We quote the following syllabus from *Capital City Dairy Co. v. Ohio,* 183 U.S. 238, also cited by respondents, as typical of the above mentioned distinction:

> "A general statement in the answer to *quo warranto* proceedings in a state court to forfeit the franchise of a corporation for its violation of a state statute, that the proper remedy is by a crim-

inal prosecution, and that "this proceeding" is in violation of the Constitution of the United States," is not sufficient to raise a Federal question, where no specification is made as to the particular clause of the Constitution relied upon, and there is nothing in the record *to show that the attention* of the state court was directed to that question." (Italics petitioners'.)

In *Bowe v. Scott,* 233 U.S. 658, it was also sought to review a decree of the state of Virginia *affirming* the decree of the Chancery Court of the city of Richmond. The court concludes that "no intimation *whatever* was contained in the opinion of the court of appeals that it deemed that a question under the contract clause of the constitution arose for decision" (pp. 664-665).

In concluding our reply to Respondents' Ground II-A, may we submit to Your Honors that even if respondents are right in the position which they take, namely, that the Federal question was for the first time raised in the Supreme Court by the second Petition for Rehearing or Reargument, petitioners will still have met the jurisdictional requirement, in view of the particular circumstances of this case.

The court will notice by reference to the record that the state court's first opinion was recalled on November 10, 1950 (Tr. 28) as incomplete under Rule 14 thereof (Tr. 36), and a *per curiam* opinion incorporating its previous opinion was later filed (Tr. 29), as the result of which a judgment for respondents was entered in reversal of the one in favor of petitioners.

Under the rules of the State Supreme Court, par-

ticularly Rule 15 (Supplemental Tr. 1) the State Supreme Court's decision did not become final until the lapse of 30 days thereafter. Respondents then having filed their Petition to Recall the Remittitur and set the case for Reargument, upon the specific claim that the decision of the court violated petitioners' right to equal protection of the laws guaranteed by the 14th Amendment, was timely, hence the court's order denying said Petition must be deemed to be a denial by the State Supreme Court that a Federal right of petitioners was violated by the court's unanticipated decision and judgment against petitioners.

Respondents' Ground II-B

What we have said before in discussing respondents' Ground II-A practically answers every contention of respondents made under this heading in their opposing brief.

We will however comment specially on the two Washington cases cited therein.

In *State ex rel. Milwaukee Term. R. Co. v. Superior Court for King County,* 54 Wash. 365, 377, 103 Pac. 469 and 104 Pac. 175, the trial court entered a judgment dismissing condemnation proceedings, which judgment was thereafter reversed by the State Supreme Court. The case was in effect a contest between relator Milwaukee R. Co. and the Great Northern Ry. Co. referred to in the opinion as the respondent. Subsequent to the reversal respondent Ry. Co. urged as additional grounds for affirmance of the lower court: (1) that the relator is not a railroad corporation within the meaning of

the eminent domain statute; (2) that the property sought to be condemned was already devoted to a public use, and (3) that there was not a sufficient showing of necessity of appropriation. All these contentions could of course have been made in the main hearing of the case before the State Supreme Court under separate assignments of error. The State Supreme Court ruled in line with other jurisdictions, that it could not "sanction the practice of permitting new questions to be raised in a petition for rehearing."

In *State v. Hazzard,* 76 Wash. 586, 137 Pac. 143, a judgment of conviction was affirmed by the Supreme Court. In a petition for rehearing the appellant defendant in the case sought to have the Supreme Court reconsider its decision of affirmance upon the further ground, advanced for the first time in such petition, that "the method of prosecution adopted by the state and permitted by the trial court and the charge to the jury given by the trial court constituted an infringement of the rights and privileges guaranteed to the defendant by the 5th and 14th Amendments of the Constitution of the United States, etc."

The State Supreme Court held that all these *extra* objections existed and could be raised at the trial of the case and upon appeal to the State Supreme Court, but were not so raised, hence it declined to entertain them for the first time.

We have argued extensively, before, that we did not become an aggrieved party until after the State Supreme Court reversed the judgment entered by the trial court in favor of petitioners.

To raise a constitutional question prior to the Supreme Court's final decision and judgment would have meant that we were offering issues hypothetically by assuming that the state court would reverse the judgment which we were naturally bound to sustain in the appeal by respondents.

Ground II-C

In further replying to respondents' various and somewhat inconsistent contentions we submit again here as in our petition (p. 14) that we lay no claim to distinction in method of presentation of the Federal question to the State Supreme Court. Nor do we believe the law to be that, in such an important matter as the infringement of a right guaranteed by the United States constitution, extreme and exacting technique is a *sine qua non* before entry through the portals of the Tribunal which has the final say in such matters. This nation of ours was above all founded and grew into leadership by and through common people, using common sense and plain ways, and if there is any branch of the state where this should be best exemplified, it is in the Temple of even scales of the balance, held by hands spelling innocence with bandaged eyes to emphasize precisely that whether dressed in ragged clothes or silk hat and spats, the seeker will therein find justice. It is enough, we believe, as far as this question is concerned, that it was presented fairly promptly after the Federal right appeared and this the state court acknowledged and "considered" in unmistakable terms by its order of Dec. 22, 1950 (Tr. 35).

Respondents' Ground II-D

Kosten v. Fleming, 17 Wn.(2d) 500, 136 P.(2d) 449, would of course have no application, if our contention, that the State Supreme Court did not actually render its final decision in this case until November 30, 1950, is right; and the State Supreme Court quite obviously agreed that we are right in this contention at least by wording its order of December 22, 1950, with scrupulous care. (Tr. 35)

In any event, however, that case is no authority that the state court lost jurisdiction to recall its Remittitur by virtue of its inherent right, which it emphasizes throughout, whenever it appears that its decision is erroneous on its face. Indeed in that case the State Supreme Court *did recall* the Remittitur, later, and rendered an amended decision, reported in 21 Wn.(2d) 825, 153 P.(2d) 309.

A study of that case and the authorities cited therein shows that the court reaffirms its inherent jurisdiction to recall the Remittitur for the purpose of correcting errors appearing on the decision, but not in order to reconsider issues submitted or which could have been submitted on appeal. With this we naturally agree. That there is a denial of a constitutional guarantee in this case is either apparent upon the face of the decision, born that is for the first time by the final rendering thereof on November 30, 1950, or else we have no case before the U. S. Supreme Court.

In the *Kosten* case, *supra,* the court refers to 5 C.J.S. 1560, Section 1906, where, among other instances listed

for the exercise of an appellate court's inherent right to recall its remittitur, are the following:

> "Or where the mandate was prematurely and erroneously issued before the expiration of the time allowed by statute for a rehearing, or for the taking of appeal or error proceedings to a still higher court."

The case of *Waters Pierce Oil Co. v. State,* 106 S.W. 326, given in the footnotes of the text, presents an analogous situation, as the following excerpt shows:

> "The affirmance of that order being a final judgment of the Court of Civil Appeals, this court has jurisdiction by Writ of Error to review the proceedings of the courts in that matter, and, the appellant in the Court of Civil Appeals having a right to present to this an application for Writ of Error, the clerk of that court had no authority to issue the mandate on the judgment of the Court of Civil Appeals until the expiration of the time allowed by law for the filing of an application for Writ of Error in that court." (page 329)

Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co. 228 U.S. 326, is not in point since the claimed Federal questions could and should have been a part of the issues tried in that case, whereas in the instant case it is the Supreme Court's decision which created the same, hence it would have been impossible to anticipate it.

The case of *Forbes v. State Council,* 216 U.S. 396, is distinguishable on the same principle, namely that the Federal question could and should have been raised as a part of the issues in the case.

Lastly, the case of *McCorquodale v. State of Texas,* 211 U.S. 432, was an appeal from a judgment of conviction and upon affirmance thereof by the State Court of Criminal Appeals an effort was made to have a Writ of Certiorari issued, claiming, for the first time, a denial of a Federal right.

This case is very similar in principle to the Washington case of *State v. Hazzard,* 76 Wash. 586, 137 Pac. 143, cited by respondents under group II-B.

We submit that Petitioners have presented a proper case for the Supreme Court's review upon a Writ of Certiorari.

Respectfully submitted,

JOHN E. LYDON
In propria persona